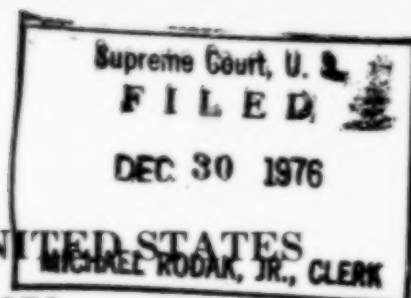


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976



NO. 76-447

* * *

**WILLIAM G. MILLIKEN, Governor of the State of
Michigan, et al.,**

Petitioners,

V.

**RONALD BRADLEY and RICHARD BRADLEY,
by their Mother and Next Friend, VERDA
BRADLEY, et al.,**

Respondents.

* * *

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

* * *

**BRIEF OF AMICUS CURIAE,
THE STATE OF TEXAS**

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

THOMAS W. CHOATE
Special Asst. Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEYS FOR THE
STATE OF TEXAS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-447

WILLIAM G. MILLIKEN, Governor of the State of
Michigan; FRANK J. KELLEY, Attorney General of
the State of Michigan; MICHIGAN STATE BOARD
OF EDUCATION, a constitutional body corporate;
JOHN W. PORTER, Superintendent of Public
Instruction of the State of Michigan; and ALLISON
GREEN, Treasurer of the State of Michigan,

Petitioners,

V.

RONALD BRADLEY and RICHARD BRADLEY, by
their Mother and Next Friend, VERDA BRADLEY;
JEANNE GOINGS, by her Mother and Next Friend,
BLANCH GOINGS; BEVERLY LOVE, JIMMY
LOVE and DARRELL LOVE, by their Mother and
Next Friend, CLARISSA LOVE; CAMILLE
BURDEN, PIERRE BURDEN, AVA BURDEN,
MYRA BURDEN, MARC BURDEN and STEVEN
BURDEN, by their Father and Next Friend,
MARCUS BURDEN; KAREN WILLIAMS and
KRISTY WILLIAMS, by their Father and Next
Friend, C. WILLIAMS; RAY LITT and MRS.
WILBUR BLAKE, parents; all parents having
children attending the public schools of the City of
Detroit, Michigan, on their own behalf and on behalf
of their minor children, all on behalf of any person
similarly situated; and NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED
PEOPLE, DETROIT BRANCH; BOARD OF

EDUCATION OF THE CITY OF DETROIT, a
school district of the first class; DETROIT
FEDERATION OF TEACHERS, LOCAL 231,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Respondents.

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF
TEXAS

* * *

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, appears in its entirety in Petitioners' Appendix, filed herein (at pages 151a-190a in Appendix to Petition for Writ of Certiorari).

Other opinions and orders delivered in lower courts in this cause are fully and completely presented in Petitioners' Brief.

JURISDICTION

Jurisdiction in this Court is properly invoked by Petitioners pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Whether, absent a finding of a constitutional violation in the structure of the curriculum and educational programs in the Detroit school system, the lower courts

erred in ordering a restructuring of that curriculum and programming.

II.

Whether the lower courts erred in ordering defendants below in the executive branch of state government to provide \$5.8 million or more in additional, unappropriated state funds to defray the cost of the restructuring of curriculum and programming in the Detroit school system.

STATEMENT

The State of Texas files this brief as *amicus curiae* in support of Petitioners pursuant to Rule 42(4), Supreme Court Rules.

The comprehensive and detailed Statement of the Case presented by Petitioners, coupled with the recitation present in the Opinion of the United States Court of Appeals for the Sixth Circuit obviates the need for a restatement in this brief.

The State of Texas files this brief to discuss the two very important issues involved herein (as reflected in Questions Presented) and limits its involvement to those two areas. Texas is certainly mindful of the need for quality education and equal treatment under the law, and finds no fault with attempting to achieve those goals in Detroit or elsewhere. However, the dangerous prospect of unlimited discretion in the federal judiciary in these matters warrants the involvement of the State of Texas in light of its continuing efforts to protect its integrity and sovereignty.

DISCUSSION

I.

ABSENT A FINDING OF A CONSTITUTIONAL VIOLATION IN THE STRUCTURE OF THE CURRICULUM AND EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE LOWER COURTS ERRED IN ORDERING A RESTRUCTURING OF CURRICULUM AND PROGRAMMING.

The spectre of the federal judiciary reshaping the curriculum and programs of an educational system to satisfy the individual or personal values and judgments of a particular member or members of the judiciary, the pronouncements of the United States Court of Appeals for the Sixth Circuit notwithstanding, in the absence of any finding of a constitutional infirmity in that curriculum is both frightening and unacceptable. The very basic principle of granting relief only where constitutional or statutory violations are evident is in great jeopardy if such an unwarranted remedy is allowed.

This litigation involves the allegation that the schools in the City of Detroit have been segregated to a degree that is constitutionally impermissible. A decision has been made that the allegation was based in fact and that desegregation must occur. Extensive relief and remedial action was ordered to rectify this situation. Unfortunately, the relief was not limited to rectifying the problem at issue; and the broadbrush treatment given by the federal courts herein cannot be condoned anymore than expanding this litigation to involve other school systems outside the City of Detroit could be

condoned. *Milliken v. Bradley*, 418 U.S. 717 (1974).

Simply stated, this Court is faced with a situation where courts of the federal judiciary have clearly been unmindful of the well-established principle that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). Whether the relief ordered with respect to the additional components is good or bad or will even improve the educational system is immaterial in the absence of a finding of a constitutional violation in the existing programs; and a finding that a constitutional violation exists in the present system in that unlawful segregation has been shown does not justify the restructuring (and increased expenditures) ordered here.

This Court recently remanded *Austin Independent School District v. United States*, No. 76-200, to the United States Court of Appeals for the Fifth Circuit in light of *Washington v. Davis*, 426 U.S. 229 (1976). The lesson to be learned from *Washington* is even more applicable to the instant cause. Here, there has been no finding that the current curriculum and program structure is discriminatory in any way to any ethnic or minority group. There has been no finding that some are provided a particular curriculum or programs which are denied to others. As with "Test 21" discussed at length at *Washington*, all students have the same chances and exposure in the present school programming; and there is no reason to believe it is anything but impartial and adequate.

The United States Court of Appeals for the Sixth Circuit attempts, partially, to justify its ordering of the additional educational components with their related price tags and court ordered partial state financing by

stating:

"Without the reading and counseling components, black students *might* be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." See Sixth Circuit Opinion reprinted in full in Petitioners' Appendix to Petition for Writ of Certiorari, at page 171a. (Emphasis added.) *Bradley v. Milliken*, 540 F.2d 229 (6th Cir. 1976).

The United States Court of Appeals for the Sixth Circuit is clearly willing to take the unwarranted and impermissible step of ordering the expenditure of millions of dollars of local funds and millions of dollars of unappropriated state funds to alter a situation which it feels "might" cause some future deprivation in an intangible such as motivation. Furthermore, such relief is ordered without any finding of constitutional violation in the present structure. Such judicial individuality cannot be allowed to stand.

In summary, the courts below have lost sight of the issue at hand in this litigation. That issue is desegregation of schools and not the restructuring of programs. After desegregation has been accomplished and an appropriate pupil mix is evident, the court should stop. *Pasadena City Board of Education v. Spangler*, ___U.S.___, 96 S.Ct. 2697, 2704-2705 (1976). Additionally, at least one other Circuit Court has also dealt with this specific issue of restructuring of programs in addition to transferring pupils in a desegregation case where there was no finding of unconstitutionality of the existing program and correctly stated:

"The clear implication of arguments in support of the court's adoption of the Cardenas

Plan is that minority students are entitled under the Fourteenth Amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not." *Keyes v. School District No. 1, Denver, Colorado*, 521 F.2d 465, 482 (10th Cir. 1975), cert den. 423 U.S. 1066 (1976).

As in *Keyes*, the fact that the educational components might be advantageous or meritorious is simply not justification enough for their inclusion as relief absent a finding of constitutional deprivation caused by the existing curriculum.

II.

THE LOWER COURTS ERRED IN ORDERING DEFENDANTS BELOW IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PROVIDE \$5.8 MILLION OR MORE IN ADDITIONAL, UNAPPROPRIATED STATE FUNDS TO DEFRAY THE COST OF THE RESTRUCTURING OF CURRICULUM AND PROGRAMMING IN THE DETROIT SCHOOL SYSTEM.

It is of utmost importance that the sovereignty of the states comprising this union not be ignored. The Tenth Amendment to the United States Constitution, stating that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

must not be ignored. The federal judiciary is not, and was never intended to be, entirely dominant in its relations with the states.

"While it is imperative that the federal courts act diligently to protect those fundamental rights whenever it appears they are infringed by the action of a state, it is equally imperative that those same courts refrain in other instances from asserting jurisdiction to intervene in the internal processes of state government." *Olbro v. Petrilli*, 60 F.R.D. 189, 192 (1973).

The restraint correctly recognized in *Olbro* is most necessary here to insure the continued vitality of the state sovereignty called for in the Tenth Amendment.

Perhaps no more clear example of abuse visited upon state sovereignty could be found than in the instant litigation. Unappropriated state funds have been ordered to be used for funding of educational components either in ignorance or disregard of the constitutionally valid state scheme for appropriation of funds solely by the state legislature and the state scheme for school financing. Mich. Const. 1963, Art. 9, §§6, 11 and 17. The state scheme for allocation of state resources has in no way been found to be constitutionally defective; yet it has been circumvented to a point of being meaningless. No more essential function of a state could be imagined than control of its own fiscal matters (so long as there is no finding of unconstitutionality in the method used).

This issue of state sovereignty raises grave concern as to the whole issue of federalism which is essential to our union. As this Court has observed:

"where . . . the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' *Stefanelli v. Minard* . . ." *Rizzo v. Goode*, ___U.S.____, 96 S.Ct. 598 (1976).

See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 44 (1973). It is clearly a matter of whether the State of Michigan is to be allowed to control its own fiscal affairs, absent constitutional violation; and there is every indication from this Court that such sovereignty of state should and will be recognized. *National League of Cities v. Usery*, ___U.S.____, 96 S.Ct. 2465, 2475-2476 (1976).

In addition to the severe blow dealt to the sovereignty of the State of Michigan pursuant to the Tenth Amendment by the lower courts, grave concern must also be expressed at the treatment given protections afforded the states under the Eleventh Amendment to the United States Constitution. Here, the lower courts have shown no hesitancy to raid the public fisc, with little more than a cursory nod at the Eleventh Amendment, to the tune of millions of dollars. Such action taken by the lower courts apparently was accomplished with almost total disregard to this Court's past instructions that desegregation remedies must take into account the practicalities of the situation at issue. *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). It is obvious that when the practicalities indicated that the lower courts' additional education components could not be implemented out of revenues of the Detroit school system, the correct focus of refashioning the remedy was ignored in favor of an unauthorized raid on state revenues.

A mention of *Edelman v. Jordan*, 415 U.S. 651 (1974) is almost mandatory at this point. The applicability of *Edelman* to this cause is most apparent to *amicus*. The state defendants here were alleged to have participated in prior wrongdoing with regard to pupil assignment. Such wrongdoing, on the part of all defendants, was alleviated by the lower courts' extensive orders reassigning pupils. What, then, is the effect of an award of state funds for the implementation of educational components upon which no findings of constitutionality have been made? *Amicus* sees such an award as either one of two possible occurrences. Either the lower courts found themselves in a bind with respect to financing programs unrelated to the lawsuit but seeming meritorious to them and went to the state treasury for lack of ready funding elsewhere; or the lower courts have decided to make an award of funds for the educational components because of the state's past action in other areas. Either reasoning is specious. The first simply cannot be tolerated in light of federalism, and the second is clearly violative of the principles pronounced in *Edelman v. Jordan*, *supra*.

A decision allowing the lower courts' order of the expenditure of unappropriated state funds in direct contradiction to state law would be intolerable. To allow a federal court to order the funding of a local program of this nature from state funds which are unappropriated certainly expands the power of the federal judiciary. In a word, the federal court would become a "super legislature." If the principles of self-determination and self-governing through elected representatives (being mindful of constitutional imperatives) is to have any meaning, the action at issue in this litigation cannot be allowed to stand.

CONCLUSION

For the reasons stated herein, *amicus* would urge this Court to remand this cause to the United States Court of Appeals for the Sixth Circuit with instructions to delete any orders of expenditures of state funds for the previously discussed educational components.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

THOMAS W. CHOATE, Special
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEYS FOR AMICUS
CURIAE, THE STATE OF
TEXAS

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief of *Amicus Curiae*, The State of Texas, have been mailed by certified mail, return receipt requested, to each of the following on this the ____ day of December, 1976:

Frank J. Kelley
Attorney General of Michigan
750 Law Building
525 West Ottawa Street
Lansing, Michigan 48913

Louis R. Lucas
525 Commerce Title Building
Memphis, Tennessee 38103

Nathaniel R. Jones
General Counsel, NAACP
1790 Broadway
New York, New York 10019

Thomas I. Atkins
451 Massachusetts Avenue
Boston, Massachusetts 02116

George T. Rumell, Jr.
724 Ford Building
Detroit, Michigan 48226

Theodore Sachs
1000 Farmer Street
Detroit, Michigan 48226

DAVID M. KENDALL, First
Assistant Attorney General

amicus brief

JAN 3 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, ET AL., *Appellants*

v.

RONALD BRADLEY, ET AL., *Appellees*

On Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICUS CURIAE ON BEHALF OF THE
COMMONWEALTH OF PENNSYLVANIA**

JEFFREY COOPER
Deputy Attorney General

J. JUSTIN BLEWITT
*Deputy Attorney General
Chief, Civil Litigation*

ROBERT P. KANE
Attorney General
Pennsylvania Department
of Justice
Capitol Annex Building
Harrisburg, PA 17120
(717) 787-3445

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976
No. 76-447

WILLIAM G. MILLIKEN, et al.,
Appellants

v.

RONALD BRADLEY, et al.,
Appellees

*On Certiorari to the United States Court of Appeals
for the Sixth Circuit*

BRIEF AMICUS CURIAE ON BEHALF OF THE
COMMONWEALTH OF PENNSYLVANIA AND
THE NATIONAL ASSOCIATION OF ATTOR-
NEYS GENERAL

INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the rules of this Court, the Commonwealth of Pennsylvania, by its Attorney General, and the National Association of Attorneys General submit this brief *amicus curiae*. The Common-

wealth of Pennsylvania, like the State of Michigan, has been, and is presently involved in litigation in federal courts in which plaintiffs seek relief which may potentially cost the state millions of dollars to implement. See, e.g. *Halderman v. Pennhurst*, C.A. No. 74-1345 (E.D. Pa. filed May 30, 1974). The precedent set by the Sixth Circuit Court of Appeals in this case, allowing a federal district court to order state defendants, contrary to the United States' as well as the state's own constitutional mandates, to expend monies in excess of specific appropriations, is a dangerous one not only to Michigan and Pennsylvania, but to the continued vitality and preservation of our federalist system.

Virtually identical provisions of the Constitutions of Michigan and Pennsylvania prohibit the payment of money from the state treasury except by lawful appropriation.¹ These state constitutional provisions are rendered virtually meaningless if a federal court is permitted to order the expenditure of unappropriated state monies for its own directed purposes. The primary function of the Michigan legislature is usurped by the order below. And the delicate balance demanded by our federalist form of government is severely tested by the lower court's unprecedented assumption of the prerogatives of the state itself.

¹ M.C.L.A. Const. Art. 9, §17 provides:

"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

Pa. Const. Art. 3, §24 provides in relevant part:

"No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers."

The Commonwealth of Pennsylvania thus has a strong interest in urging that the usurpation of state power by the federal courts below be corrected, there by assuring mutual regard for the respective powers of the states of this union and the federal judiciary.

ARGUMENT

I. The Eleventh Amendment Prohibits a Federal Court From Ordering a State To Spend Unappropriated State Funds

The order of the district court, affirmed by the circuit court, required the State of Michigan to pay fifty percent of the excess costs for implementing specific educational programs in the Detroit School District. Such relief is barred by the Eleventh Amendment. A federal court simply does not have the power to order the expenditure of unappropriated state funds for specific programs mandated by that court.

A brief description and history of the interpretation of the Eleventh Amendment is necessary to properly understand the issue in this case. As a result of the Supreme Court's opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and the outcry it produced, see, C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 46-74 (1972), the Eleventh Amendment² was formally ratified in January, 1798. Its prohibition, embodying the principle of state sovereignty, ap-

² The Eleventh Amendment provides:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

plies to suits brought by citizens of one state against another state, as well as to suits brought by citizens against their own state. *Hans v. Louisiana*, 134 U.S. 1 (1890). The prohibitions expressed by the Amendment apply not only in cases where a state is a party of record, *Osborn v. Bank of the United States*, 19 U.S. 405 (1821), but also to cases in which the state is the real party in interest. *Ex parte Ayers*, 123 U.S. 443 (1887); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

The early history of the Eleventh Amendment is succinctly summarized by Justice Gray, dissenting in *United States v. Lee*, 106 U.S. 196 (1882):

"In those cases in which judgments have since been rendered by this court against individuals concerning money or property in which a state had an interest, either the money was in the personal possession of the defendants and not in the possession of the state, or the suit was to restrain the defendants by injunction from doing acts in violation of the constitution of the United States." (Citation omitted.) 106 U.S. at 242.

Thus, the primary purpose of the Eleventh Amendment was to protect states, even though not parties of record, from actions seeking money actually in the state treasury and to similarly protect state officials except when their specific actions were challenged as violating the United States Constitution.

Louisiana v. Jumel, 107 U.S. 711 (1883), further developed the protections afforded the states by the

Eleventh Amendment. The State of Louisiana issued bonds in 1874 and obligated itself to levy annual taxes on property until the bonds were discharged. In 1880 a new constitution was adopted by Louisiana which prevented state officials from using the revenue collected from previous taxes to pay the interest on the bonds falling due in January 1880, or to pay principal and interest falling due thereafter. Three bondholders brought suit in federal court claiming that Louisiana had unconstitutionally impaired their contracts.

The Supreme Court did not deny that Louisiana violated its contract. *Id.* at 721. But the question addressed was:

"[W]hether the contract can be enforced notwithstanding the constitution, by coercing the agents and instrumentalities of the State, whose authority has been withdrawn in violation of the contract, without having the State itself in its political capacity a party to the proceedings." *Id.* at 721.

Chief Justice Waite characterized the relief requested as follows:

"The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme pow-

er has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." *Id.* at 721.

Justice Waite concluded for the Court: "there is nothing in any of the cases in this court that are relied on which, to our minds, authorizes any such relief as is asked." *Id.* at 724. *Jumel's* reasoning compels a finding that the lower courts here exceeded their constitutional authority by, in effect, abrogating laws which the people of Michigan have determined to be necessary for the fiscal control of their government. *Jumel* again:

"The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too in a proceeding in which the State, as a State, was not and could not be made a party. *It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.* When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judg-

ment that may be rendered, then such coercion may be employed for that purpose. *But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.* In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power." (Emphasis added.) *Id.* at 727-28.

Jumel clearly prohibits a federal court from disregarding a State's own constitutional mandates and from replacing the power of the state legislature to make appropriations with its own unchecked and unguarded orders. There can be no doubt that the relief ordered by the lower court runs directly against the State of Michigan. Its sovereign power to manage the public fisc cannot be so invaded. Such relief is barred by the Eleventh Amendment.

The principles enunciated in *Louisiana v. Jumel* were reaffirmed in *Hagood v. Southern*, 117 U.S. 52 (1886), and again in *Ex parte Ayers*, 123 U.S. 443 (1887). *Hans v. Louisiana*, 134 U.S. 1 (1890), is most frequently cited for the proposition that a state cannot be sued without its consent in federal court by its own citizens. But the Court's opinion is also memorable for its recognition of the inherent and exclusive powers of state legislatures even when the legislature fails to discharge the State's public debts.

"It is not necessary that we should enter upon an examination of the reason or expediency

of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." 134 U.S. at 21.

As in *Hans*, the legislature of Michigan may risk the "odium of the world" by not allocating funds sufficient to assist the Detroit School Board in meeting its obligations. But the federal courts must allow the Michigan legislature to assume this risk. A federal court simply cannot compel state officials to spend monies which the legislature has not appropriated. Such compulsion would run directly against the state. And the presence of the state itself in a federal proceeding, is, pursuant to the Eleventh Amendment, beyond the jurisdiction of the federal court.

During the final years of the nineteenth century and the early years of the twentieth century, the Court continued to develop the principle that the Eleventh Amendment would not bar a suit against state officers when their actions were taken pursuant to an unconstitutional statute or were beyond the authority provided by valid laws. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891); *Scott v. McDonald*, 165 U.S. 58 (1897); *Smyth v. Ames*, 169 U.S. 466 (1898); *Prout v. Star*, 188 U.S. 537 (1902); *McNeil v. Southern Railroad*, 202 U.S. 543 (1905). During this period, the Court again recognized in *Smith v. Reeves*, 178 U.S. 436 (1899), that the Eleventh Amendment barred an action seeking to compel a state officer to pay a sum certain from the state treasury.

Ex parte Young, 209 U.S. 123 (1908), is considered the watershed case on the Eleventh Amendment. The court established that when a state official acts pursuant to an unconstitutional statute he is no longer protected by the state's sovereignty. An action in equity seeking to enjoin the enforcement of an unconstitutional statute is against the office holder in his individual capacity and therefore not barred by the Eleventh Amendment. Clearly then a state official acting under a constitutionally valid statute remains cloaked with the immunity afforded by the Eleventh Amendment. An injunction against its enforcement would necessarily run against the state itself. Federal courts are simply without the constitutional power to enter such an order.

The Court continued after *Ex parte Young* to recognize the constitutional limitations on the power of

federal courts to entertain actions actually against a state. In *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909), the Court held that an action could not be maintained to compel a state to make specific performance on a contract by a state. *In re State of New York*, 256 U.S. 409 (1921), extended that principle to apply to cases which would require the state to make "pecuniary satisfaction for any liability". *Id.* at 501.

More recent decisions of this Court convincingly reject a boundless concept of the power of the federal judiciary. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Edelman is perhaps the most important Eleventh Amendment case since *Ex parte Young*. This Court reiterated the canons of Eleventh Amendment jurisprudence and for the first time attempted to clearly define the scope of relief not forbidden by the Amendment's operation. Prospective injunctive relief requiring officials to cease improper action, even if it has an ancillary effect on the state treasury is permissible. But the order now under review is a remarkably different matter. The court has not ordered the State of Michigan simply to cease unconstitutional actions. Indeed, neither the method by which Michigan finances its public schools nor the educational programs in the City of Detroit have ever been found to be constitutionally inadequate.

The remedy ordered by the lower court is not to remedy constitutionally deficient programs. The

court, in effect, made a direct assessment against the treasury of the State of Michigan to pay for changes to programs never found to be constitutionally inadequate.

It is precisely such a levy on state funds by a federal court which the Eleventh Amendment is designed to prohibit.

II. The Lower Court's Order Violates the Principles of Federalism

A principle tenet of American democracy is that only a popularly elected legislature may control the government's treasury. Article I, Section 9, Clause 7 of the United States Constitution provides: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."³

This fundamental principle inherent in our government has been frequently recognized by this Court. *East St. Louis v. Zelby*, 110 U.S. 321, 324 (1884); *Cincinnati Soup Co. v. United States*, 301 U.S. 308, 321 (1937). And in *United States v. Standard Oil Co.*, 322 U.S. 301 (1947), this Court recognized that: "Congress, not this court or the other federal courts, is the custodian of the national purse". *Id.* at 314.

The federal judiciary is similarly restrained with respect to a state's treasury. *Steward Machine Co. v.*

³ See *supra*, n. 1, for similar provisions of the Michigan and Pennsylvania Constitutions.

Davis, 301 U.S. 548, 595 (1937); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Even in *Edelman*, this Court clearly indicated that a state's own power to appropriate the funds in its treasury could not be abrogated by the ruling of a federal court. Here, where the federal court has abrogated that inherent power of the state, the programs for which Michigan is forced to pay are not even designed to remedy programs found to be constitutionally inadequate. This Court, as in *Edelman*, must again conclude that such encroachment by the federal judiciary on the prerogatives of the state legislature are contrary to the fundamental principles of our democratic and federalist system.

CONCLUSION

For the foregoing reasons and authorities, the Commonwealth of Pennsylvania and the National Association of Attorneys General respectfully urge this Court to reverse the order of the Court of Appeals requiring the State of Michigan to pay at least fifty percent of the excess costs of implementing the educational component programs mandated by the District Court.

Respectfully submitted,

JEFFREY COOPER

Deputy Attorney General

J. JUSTIN BLEWITT

Deputy Attorney General

Chief, Civil Litigation

ROBERT P. KANE

Attorney General

Department of Justice

Capitol Annex Building

Harrisburg, PA 17120

(717) 787-3445

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

By: SLADE GROTON, *President*

Attorney General of the State of Washington

444 N. Capitol Street

Washington, DC 20001

(202) 624-5454